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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS, INC. and ROBERT M. GOLDWYN, M.D.,

Petitioners,

v.

CELIA ANDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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QUESTIONS PRESENTED

1. Whether Utah's exercise of *in personam* jurisdiction over a non-resident medical association and one of its members violates the Due Process Clause when the defendants' only contacts with Utah are related to their limited voluntary participation outside Utah in a national clinical investigation of a medical device and when other factors render the exercise of jurisdiction unreasonable.

2. Whether the Supreme Court of the State of Utah erred in concluding that a non-resident medical association and one of its members had sufficient minimum contacts with Utah to satisfy the requirements of the Due Process Clause when the contacts between defendants and Utah are comprised solely of defendants' limited voluntary participation in a clinical investigation of a medical device sponsored by a third-party.

LIST OF PARTIES

The parties before the Utah trial court were: petitioners, American Society of Plastic and Reconstructive Surgeons, Inc. and Robert M. Goldwyn, M.D.; respondent Celia Anderson; Broadbent & Woolf, Inc., a Utah professional corporation; Robert M. Woolf, M.D., individually; and Dow Corning Corporation.

The parties before the Supreme Court of the State of Utah were petitioners, American Society of Plastic and Reconstructive Surgeons, Inc. and Robert M. Goldwyn, M.D., and respondent Celia Anderson. Broadbent & Woolf, Robert M. Woolf, M.D., and Dow Corning Corporation did not contest *in personam* jurisdiction in Utah and, as such, were not parties to the appeal to the Utah Supreme Court.

Pursuant to Supreme Court Rule 29.1, petitioners state that petitioner, American Society of Plastic and Reconstructive Surgeons, Inc. has no parent companies or subsidiaries except for one wholly owned subsidiary.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Petitioners, American Society of Plastic and Reconstructive Surgeons, Inc. and Robert M. Goldwyn, M.D., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah, entered in these proceedings on November 15, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah, to be reported at 807 P.2d 825 (Utah 1990), is reproduced in Appendix A hereto, pp. 1a-9a. The opinion of the Third Judicial District Court for Salt Lake County in the State

of Utah (Russon, J.) has not been reported. It is reproduced in Appendix B hereto, pp. 10a-12a. In addition, Judge Russon rendered an oral opinion in open court which is reproduced in Appendix C hereto, pp. 13a-16a.

JURISDICTION

On September 25, 1987, the District Court of the Third Judicial District for Salt Lake County in the State of Utah granted petitioners' Motion to Quash Service of Process and to Dismiss Plaintiff's Complaint. Appendix B. The trial court also gave an oral opinion in open court setting forth its reasons for granting the motion. Appendix C. On November 15, 1990, the Supreme Court of the State of Utah reversed the decision of the trial court. Appendix A. On February 6, 1991, the Supreme Court of the State of Utah denied petitioners' timely-filed petition for rehearing. Appendix D. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides:

> Section I. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF FACTS

This action arises out of injuries respondent, Celia Anderson, allegedly suffered as a result of injections of liquid silicone she received as treatment for a severe facial disease. Anderson agreed to participate in a Silicone Injection Study ("Study") sponsored by Dow Corning Corporation ("Dow") and conducted under the auspices of the Food and Drug Administration ("FDA")[1] after her physician, Dr. Robert M. Woolf, diagnosed her as suffering from facial lipodystrophy.[2] The Study involved the use of a sterile injectable silicone fluid (MDX4-4011) utilized for soft tissue reconstruction. The purpose of the Study was to develop a treatment for certain types of severe facial defects for which no other reasonable treatment was available.

American Society of Plastic and Reconstructive Surgeons, Inc. ("ASPRS"), a voluntary membership association of

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[1] Through regulations promulgated under the Food, Drug, and Cosmetic Act, the FDA exercised a substantial degree of control over the implementation of the Study. As sponsor of the Study, Dow was obligated to obtain FDA approval before making the MDX4-4011 available for use in the Study. 21 CFR §§ 312.20, 312.40 (1990). In addition, Dow was responsible for: the selection of qualified investigators; providing the investigators with information necessary to properly conduct the Study; ensuring proper monitoring of the Study and that it was conducted in accordance with the protocol; and ensuring that the FDA and all investigators were promptly informed of significant new adverse effects or risks with respect to MDX4-4011. 21 CFR § 312.50 (1990). Dow received approval from the Drug/Surgical Advisory Committee of the FDA on December 16, 1977.

[2] Facial lipodystrophy is a disease characterized by the progressive and systematic atrophy or wasting away of the fat normally present in a person's face.

approximately 4000 board-certified plastic surgeons practicing in the United States, Canada, and abroad, is an Illinois not-for-profit corporation with its principal place of business in Arlington Heights, Illinois. It has never qualified to do business in Utah, has never had an office or employees in Utah, and has never had an agent for acceptance of service of process in Utah. ASPRS is governed by a Board of Directors, none of whom resides in Utah. ASPRS has never contracted to supply services or goods in Utah, nor has it ever had a telephone listing or bank account in Utah, or owned, used, or possessed any real estate in Utah. ASPRS does not and cannot practice medicine in any State, including Utah, and does not manufacture, sell, or distribute any drug or device (including MDX4-4011). Although meetings of the membership are held on an annual basis, ASPRS has never met in Utah.

ASPRS assisted Dow in developing the protocol[3] for the Study and obtaining FDA approval for the Study. As part of this assistance, ASPRS recommended several plastic surgeons who could serve as the medical monitor for the

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[3] The FDA requires a protocol to be prepared for all clinical studies. The purpose of a protocol is to describe the study. It should include a statement of the objectives and purpose of the study; the names, addresses and qualifications of the investigators involved in the study; the names and addresses of the research facilities used; the name and address of the reviewing Institutional Review Board; the criterion for patient selection and exclusion; a description of the overall design of the study; a description of the methods to be used in determining the doses to be administered; a description of the observations and measurements to be made to fulfill the objectives of the study; and, a description of the clinical procedures, etc. to be taken to monitor the effects of the drug in human subjects and minimize risk. *See* 21 CFR § 312.23(a)(6)(iii) (1990).

Study, as required by the FDA[4]; recommended plastic surgeons who could act as clinical investigators for the Study[5]; recommended geographic regions in which the Study could be conducted; recommended facial hemiatrophy and facial lipodystrophy as the only conditions which would qualify patients to participate in the Study[6]; provided Dow with technical information that Dow used in preparing a consent form (required by the FDA) to be used in connection with the Study; and provided plastic surgeons who would assist Dow in training the clinical investigators in Ann Arbor, Michigan.

Dow had the ultimate responsibility to prepare and submit the protocol to the FDA for approval. Specifically, Dow made the final decision regarding the selection of the medical monitor and clinical investigators. Moreover, Dow chose the geographic regions in which the Study would be conducted, and had ultimate responsibility for the form and content of the consent form. Finally, Dow provided all the MDX4-4011 used in the Study.

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[4] FDA regulations require the sponsor of any clinical investigation, in this case Dow, to "select a monitor qualified by training and experience to monitor the progress of the investigation." 21 CFR § 312.55(d) (1990).

[5] A clinical investigator is responsible for ensuring that the investigation is conducted in accordance with the investigational plan and applicable regulations. 21 CFR § 312.60 (1990). In addition, an investigator is obligated to obtain the informed consent of each person to whom the drug is administered. 21 U.S.C. § 355(i) (1988); 21 C.F.R. § 310.102 (1977).

[6] Facial hemiatrophy is a condition characterized by a congenital or acquired wasting of the skin tissues and bone on one side of the face.

Once Dow received FDA approval, ASPRS' involvement in the Study substantially diminished.[7] Clinical investigators with patients whom they believed qualified for participation in the Study (and who volunteered to participate in the Study), were wholly responsible for seeking approval for their patients to participate in the Study by sending an application to the medical monitor selected by Dow, Dr. Robert M. Goldwyn.

Dr. Goldwyn, a board-certified plastic and reconstructive surgeon, resides in Brookline, Massachusetts, and is licensed to practice medicine only in Massachusetts. Dr. Goldwyn has never been licensed to practice medicine in Utah, nor has he ever advertised in, maintained an office in, or otherwise transacted any business, including the practice of medicine, in Utah. Dr. Goldwyn is not employed as a physician by ASPRS or Dow, nor did he receive any payment for his assistance in the Study except for nominal reimbursement of his administrative costs and expenses. As medical monitor, Dr. Goldwyn was responsible only for screening the medical information of potential participants in the Study (which clinical investigators forwarded to him) to determine whether the applicant satisfied the FDA guidelines for participation in the Study.

One of the twelve geographic regions Dow selected for the Study was Salt Lake City, Utah. Anderson was a patient of Dr. Woolf, the clinical investigator in Salt Lake City, who diagnosed Anderson as having facial lipodystrophy. With Anderson's consent, Dr. Woolf sought approval

[7] While ASPRS members in their individual capacities acted as clinical investigators for the Study, ASPRS' only activity with respect to the Study after it commenced was to see that investigators transmitted to Dow the required reports and follow-up information regarding their patients.

for her participation in the Study by sending medical information regarding her condition to Dr. Goldwyn in Massachusetts. After he reviewed the information submitted, Dr. Goldwyn approved Anderson's participation in the Study. Anderson was subsequently treated by Dr. Woolf with MDX4-4011. As a result of the severe reaction she had to the silicone, Anderson has undergone surgical procedures to remove the silicone.

In 1983, Anderson brought this lawsuit against Dr. Woolf and Dow in Utah State court. ASPRS and Dr. Goldwyn were not named as defendants in the original complaint. During discovery, Anderson learned for the first time of ASPRS' and Dr. Goldwyn's role in providing medical and technical assistance to Dow. Indeed, Anderson has testified that she had not heard of ASPRS or Dr. Goldwyn until after this lawsuit was filed. Anderson subsequently amended her complaint to add ASPRS and Dr. Goldwyn as defendants and served both under Utah's long-arm statute, Utah Code Ann. § 78-27-24 (1987). ASPRS and Dr. Goldwyn moved to quash service of process and dismiss the complaint for lack of personal jurisdiction. The Third Judicial District Court for Salt Lake County of the State of Utah granted this motion. Appendices B & C. Anderson appealed this dismissal to the Utah Supreme Court, which reversed. Appendix A.

In reversing the trial court, the Utah Supreme Court stated that it applied a two-part test to determine whether Utah could properly exercise personal jurisdiction over ASPRS and Dr. Goldwyn. First, the court found that exercising jurisdiction over ASPRS and Dr. Goldwyn was proper under the Utah long-arm statute, Appendix pp. 6a-7a, based upon its conclusion that Anderson had made a *prima facie* showing that ASPRS and Dr. Goldwyn caused injuries to Anderson in Utah, thereby committing a tort

in Utah within the meaning of the Utah long-arm statute. The court then concluded that an assertion of personal jurisdiction over ASPRS and Dr. Goldwyn would not violate the Due Process Clause of the Fourteenth Amendment, Appendix p. 8a, stating:

> Facts supporting this conclusion include the following: ASPRS—(1) its committee selected Salt Lake City as a program site, (2) its committee selected Woolf as a program physician, (3) it assisted in preparing the consent form which it knew would be used in Utah, (4) it (with Dow) selected Goldwyn as monitor of treatment in the program, including anticipated treatment in Utah, (5) it investigated the potential for malpractice claims, including those that might arise in Utah, and (6) it trained Woolf, knowing he would use that training in Utah; Goldwyn—(1) helped draft the consent form, (2) supervised the proper administration of the treatment program in Utah, (3) authorized Anderson's silicone injections, and (4) assumed responsibility to monitor Anderson's treatment and to follow up if there were problems.

Appendix p. 8a.

REASONS FOR GRANTING CERTIORARI

ASPRS and Dr. Goldwyn voluntarily assisted a medical device-manufacturer in the preparation and implementation of a well-directed, controlled, important clinical study intended to advance medical science and develop a new method of treatment for severe and previously untreatable disorders that resulted in the disfigurement of those affected. Neither ASPRS nor Dr. Goldwyn was ever physically present in Utah in connection with this voluntary

assistance. The Utah Supreme Court's decision in this case requires ASPRS and Dr. Goldwyn to submit to a trial in a forum in which they are not present and with which they have no contacts merely because of their assistance to Dow. If permitted to stand, this decision will have a chilling effect on the extent to which medical associations and their members are willing to participate in important clinical investigations.

In reaching its decision that Utah's assertion of personal jurisdiction over ASPRS and Dr. Goldwyn comported with the requirements of due process, the Utah Supreme Court rejected or ignored the teachings of this Court regarding the limits the Due Process Clause places on the various States' exercises of *in personam* jurisdiction over non-resident defendants. For this reason, this Court should issue a writ of certiorari to the Utah Supreme Court. In addition, a writ of certiorari will permit this Court to clarify the confusion currently plaguing the jurisdictional due process inquiry. Finally, a writ of certiorari to the Utah Supreme Court is necessary to reverse the chilling effect which the Utah Supreme Court's decision will have on volunteerism in worthy projects such as Dow's Silicone Injection Study.

I.

THE UTAH COURT FAILED TO CONDUCT A PROPER ANALYSIS UNDER THIS COURT'S TWO-PART DUE PROCESS JURISDICTIONAL INQUIRY

Since this Court's decision in *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Due Process Clause of the Fourteenth Amendment has limited the extent to which a State is permitted to enter binding judgments against non-resident defendants not served within the State's borders. The

scope of the due process restrictions on a State's exercise of *in personam* jurisdiction has undergone continued refinement since the landmark decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), in which this Court held that a State may assert jurisdiction over a defendant not found within the State only if the defendant "ha[s] certain minimum contacts with [the State] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316.

As currently interpreted, the jurisdictional due process inquiry contains two separate analyses. First, courts must consider whether the defendant has "purposefully established minimum contacts within the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Second, courts must consider the non-resident defendant's purposeful contacts with the forum State in light of other factors to determine whether the exercise of jurisdiction is reasonable, *i.e.*, would comport with "traditional notions of fair play and substantial justice." *Asahi Metal Indus. v. Superior Court of California*, 480 U.S. 102, 113 (1987); *Burger King*, 471 U.S. at 476; *see also Asahi Metal*, 480 U.S. at 116 (Brennan, J., concurring in part and in the judgment).

The Utah Supreme Court failed to conduct the proper due process analyses as set forth in this Court's decisions in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), *Burger King*, and *Asahi Metal*. This failure may be the result of the confusion which exists among federal and state courts regarding how the reasonableness factors apply to the jurisdictional due process inquiry. A properly conducted analysis under both prongs of the due process inquiry demonstrates that Utah's assertion of jurisdiction in this case is improper.

II.

THE CONFUSION THAT HAS RESULTED FROM THIS COURT'S DECISIONS IN *WORLD-WIDE VOLKSWAGEN, BURGER KING* AND *ASAHI METAL* UNDERMINES THE GOALS OF CONSISTENCY AND PREDICTABILITY IN JURISDICTIONAL DETERMINATIONS

In the context of personal jurisdiction, the protections afforded by the Due Process Clause give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Lower courts' interpretations and applications of the competing views set forth in *Asahi Metal* as to the relationship between the two prongs of the due process inquiry have undermined this goal of predictability.[8] Lower courts, both federal and state, have issued numerous conflicting opinions in attempting to apply the analyses set forth in *World-Wide Volkswagen*, *Burger King*, and *Asahi Metal*.

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[8] Quoting Winston Churchill, one federal court has described the jurisdictional inquiry as " 'a riddle wrapped in a mystery inside an enigma.' " *Donatelli v. National Hockey League*, 893 F.2d 459, 462 (1st Cir. 1990). In more direct terms, another federal court has raised the need for a clarification of the standards governing jurisdictional determinations.

> More sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it—and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions. . . .

Lak, Inc. v. Deer Creek Enterprises, 885 F.2d 1293, 1304 n. 7 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1525 (1990).

In *Burger King*, this Court stated, "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " 471 U.S. at 477. Various courts have interpreted this language to establish purposeful availment as a threshold jurisdictional requirement. For example, the Court of Appeals for the First Circuit has held: "A reviewing court must first examine the defendant's contacts with the forum. If the same do not exist in sufficient abundance, that is, if the constitutionally necessary first-tier minimum is lacking the inquiry ends." *Donatelli*, 893 F.2d at 465.[9] Consistent with this

[9] *See also Chung v. NANA Development Corp.*, 783 F.2d 1124, 1129 (4th Cir.), *cert. denied*, 479 U.S. 948 (1986) ("[b]ecause personal jurisdiction here fails the threshold test of 'minimum contacts,' we need not separately consider the convenience of any particular forum to the respective parties"); *Lak, Inc. v. Deer Creek Enterprises*, 885 F.2d at 1303; *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 817-18 n. 10 (9th Cir. 1988); *Ex Parte Pope Chevrolet, Inc.*, 555 So. 2d 109, 112 & n.1 (Ala. 1989) (interpreting *Asahi Metal* to establish purposeful availment as a threshold inquiry); *Grange Ins. Ass'n v. State*, 110 Wash. 2d 752, 765, 757 P.2d 933, 940 (Wash. 1988) (en banc), *cert. denied*, 490 U.S. 1004 (1989) (if purposeful availment not established, court will not consider reasonableness factors); *Wiles v. Morita Iron Works Co., Ltd.*, 125 Ill. 2d 144, 161-62, 530 N.E.2d 1382, 1390 (Ill. 1988); *Goodyear Tire v. Ruby*, 312 Md. 413, 423, 540 A.2d 482, 487 (Md. 1988); *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 271-72, 736 P.2d 2, 5-6 (Ariz. 1987); *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal. App. 3d 106, 117, 241 Cal. Rptr. 670, 676 (1987); *Superior Supply Co. v. Associated Pipe & Supply Co.*, 515 So. 2d 790, 796 & n. 14 (La. 1987); *Witbeck v. Bill Cody's Ranch Inn*, 428 Mich. 659, 669, 411 N.W.2d 439, 444 (Mich. 1987); *State ex rel. Wichita Falls Gen. Hosp. v. Adolf*, 728 S.W.2d 604, 609 (Mo. App.), *cert. denied*, 484 U.S. 927 (1987). *But see Camelback Ski Corp. v. Behning*, 312 Md. 330, 341, 539 A.2d 1107, 1112 (Md.), *cert. denied*, 488 U.S. 849 (1988) ("although it is convenient to speak of the two analyses as separate steps, the 'threshold' step is not considered in a vacuum, nor must it invariably be the first step").

approach, other courts have considered the reasonableness factors only if the purposeful availment prong has been satisfied.[10]

Following the lead of the O'Connor plurality in *Asahi Metal*, some courts have considered the reasonableness factors even after finding the absence of purposeful availment.[11] Still other courts have adopted the view set forth by Justice Stevens in his concurring opinion in *Asahi Metal* that purposeful availment need not be considered in cases where the jurisdictional determination can be made solely on the basis of reasonableness considerations.[12]

Finally, several courts have apparently ignored the teachings of *Burger King* and *Asahi Metal* by upholding assertions of jurisdiction solely on the basis of purposeful avail-

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[10] *See, e.g., Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701 (3d Cir. 1990); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 282 (4th Cir. 1988); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988); *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 284 (7th Cir. 1990); *Sher v. Johnson*, 911 F.2d 1357, 1364 (9th Cir. 1990); *Equifax Services, Inc v. Hitz*, 905 F.2d 1355, 1359 (10th Cir. 1990); *Williams Elec. Co., Inc. v. Honeywell, Inc.*, 847 F.2d 741, 743 (11th Cir. 1988); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 328, 558 A.2d 1252, 1257 (N.J. 1989).

[11] *See U.S.S. Yachts, Inc. v. Ocean Yachts, Inc.*, 894 F.2d 9, 12-13 (1st Cir. 1990); *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 661 (4th Cir. 1989); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990).

[12] *See FDIC v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1442 (9th Cir. 1987); *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986).

ment; the reasonableness factors were not considered.[13] The Utah Supreme Court appears to have followed this latter approach.[14] In doing so—that is, by failing to conduct a meaningful inquiry into the reasonableness of exercising jurisdiction over ASPRS and Dr. Goldwyn—the Utah Supreme Court avoided having to address and resolve the ambiguities which have plagued other courts in their interpretation of the two-part due process inquiry.

III.

THE ASSERTION OF PERSONAL JURISDICTION BY UTAH OVER ASPRS AND DR. GOLDWYN VIOLATES DUE PROCESS

This Court made it clear in *World-Wide Volkswagen* that, in addition to satisfying the minimum contacts/purposeful availment inquiry set forth in *International Shoe* and its progeny, a State's exercise of jurisdiction over a

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[13] *See North Penn Gas v. Corning Natural Gas*, 897 F.2d 687, 691 (3d Cir.), *cert. denied*, 111 S. Ct. 133 (1990); *English & Smith v. Metzger*, 901 F.2d 36, 39-40 (4th Cir. 1990); *Daniel J. Hartwig Assocs., Inc. v. Kanner*, 913 F.2d 1213, 1216-20 (7th Cir. 1990); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1313-14 (7th Cir. 1990); *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 389 (11th Cir. 1989); *Northern Aircraft, Inc. v. Reed*, 572 A.2d 1382, 1386-87 (Vt. 1990) (although recognizing the two-part test, court based assertion of personal jurisdiction solely on purposeful availment).

A survey of the confusion generally existing in the lower federal and state courts would not be complete without noting that certain courts have utilized the two-part due process inquiry set forth by this Court in *Asahi Metal* in "general jurisdiction" cases to which the two-prong inquiry does not apply. *See Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1361-63 (5th Cir. 1990); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358-59 (Tex. 1990).

[14] Both ASPRS and Dr. Goldwyn timely raised this aspect of the due process inquiry in their brief to the Utah Supreme Court.

non-resident defendant must be reasonable. The Utah Supreme Court's conclusion that due process permits the exercise of jurisdiction over ASPRS and Dr. Goldwyn is in error. First, the conclusion that ASPRS and Dr. Goldwyn purposefully established sufficient minimum contacts with Utah is in conflict with the decisions of this Court. Further, a meaningful consideration of the reasonableness factors demonstrates that the exercise of jurisdiction in this case is unreasonable.

A. The Utah Court's Determination That ASPRS And Dr. Goldwyn Purposely Availed Themselves Of The Privilege Of Conducting Activities In Utah Is In Conflict With The Decisions Of This Court

In *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), this Court established "minimum contacts" as the appropriate standard to ensure that the exercise of personal jurisdiction does not offend "traditional notions of fair play and substantial justice." Subsequent decisions of this Court made it clear that the "minimum contacts" test could only be satisfied by conduct that was purposefully directed at the forum State *by the defendant.*

> The unilateral activities of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing *International Shoe*) (emphasis added); *see also Kulko v. Superior Court of California*, 436 U.S. 84, 94 (1978) (quoting

Hanson). While recognizing that the expansion of interstate commerce has necessitated some relaxation of the restraint due process places on a State's exercise of jurisdiction over non-resident defendants, this Court has consistently held that the restraint has not been abandoned. *Burger King*, 471 U.S. at 474 ("constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State"). *See generally* Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 Ariz. St. L.J. 585.

"This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random', 'fortuitous', or 'attenuated' contacts . . . or of the 'unilateral activity of another party or third person.' " *Burger King*, 471 U.S. at 475. For this reason, this Court has rejected the proposition that mere foreseeability that an event will occur in another State is sufficient to satisfy due process.

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

World-Wide Volkswagen, 444 U.S. at 297. By holding that Utah may exercise jurisdiction over ASPRS and Dr. Goldwyn in this case, the Utah Supreme Court is in direct conflict with this precedent.

In reversing the trial court's order of dismissal, the Utah Supreme Court concluded on the basis of conclusory allegations that ASPRS and Dr. Goldwyn had engaged in "purposeful acts" directed towards Utah sufficient to satisfy due process. ASPRS and Dr. Goldwyn dispute the

propriety of the Utah Supreme Court's factual determinations. Indeed, a careful review of the record in this case demonstrates that none of the Utah Court's factual determinations is supported by competent evidence.

ASPRS did not select Salt Lake City as a program site. Rather, ASPRS only recommended to Dow that Salt Lake City might be suitable as a program site. Dow ultimately selected twelve regional sites from a list of thirty-one proposed by ASPRS which included Salt Lake City. Similarly, ASPRS did not select Dr. Goldwyn as the medical monitor for the Study or Dr. Woolf as a clinical investigator. Rather, ASPRS recommended several physicians whom would be a suitable medical monitor; Dow then selected Dr. Goldwyn. Similarly, Dow selected Dr. Woolf as a clinical investigator from a list of suitable physicians provided by ASPRS.

While ASPRS provided medical expertise to assist Dow in its preparation of the consent form which would be used with all volunteers in the program, ASPRS did not know at that time that the form would be used in Utah. In any event, Dow had ultimate authority regarding the form and content of the consent form which required, and received, FDA approval. Finally, Dow was responsible for training the clinical investigators it selected (including Dr. Woolf). This training program was conducted in Michigan, not Utah, with the assistance of ASPRS members who acted as faculty for part of the program.

Dr. Goldwyn's role as medical monitor was limited to a review of medical information submitted by applicants. If the clinical investigator provided additional information during the course of the treatment, Dr. Goldwyn would review such medical information. It is important to note, however, that clinical investigators were not required to

submit additional information to Dr. Goldwyn. Moreover, he had no responsibility for the actual treatment of patients who volunteered for the Study. Dr. Goldwyn did not supervise Dr. Woolf's participation in the Study generally, nor did he supervise Dr. Woolf's silicone injections of Anderson. Finally, Dr. Goldwyn never assumed any responsibility to monitor Anderson's treatment or any subsequent work necessitated by Anderson's reaction to the silicone injections. Anderson testified that it was only through discovery in this case that she became aware of Dr. Goldwyn's existence. Thus, there is no support for the Utah Supreme Court's conclusion that a physician/patient relationship existed between Dr. Goldwyn and Anderson.

The findings of fact by the Utah Supreme Court are wholly unsupported by competent evidence. By relying on these unsupported findings, the Utah Supreme Court completely eviscerated ASPRS' and Dr. Goldwyn's constitutional right to not be haled into a forum with which neither had established meaningful contacts. Conjecture, speculation and wishful thinking are not substitutes for properly supported *findings* of minimum contacts necessary to assert personal jurisdiction.

Even assuming the Utah Supreme Court properly "found" these jurisdictional facts to exist, such facts do not establish purposeful availment of the benefits of Utah by either ASPRS or Dr. Goldwyn. As to the ASPRS, none of the facts relied upon by the Utah Supreme Court is in any way related to Utah. ASPRS' assistance of Dow by recommending Salt Lake City as a possible program site, Dr. Woolf as a possible program physician, and Dr. Goldwyn as a possible medical monitor, all occurred either in Illinois (where ASPRS is headquartered) or Michigan (where Dow is headquartered). ASPRS' assistance of Dow in the prep-

aration of the consent form was similarly removed from Utah. Finally, the training program in which ASPRS members assisted Dow was conducted in Michigan. As to Dr. Goldwyn, his participation was limited to the pre-screening of applicants to the Study to ensure they met the qualifications for participation set forth in the protocol. The fact that Anderson applied for permission to participate in the Study from Utah and was subsequently approved for admission by Dr. Goldwyn in Massachusetts does not show purposeful availment by Dr. Goldwyn of the rights and privileges of the Utah forum. *Cf. Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (Ariz. 1987) (defendant's correspondence with plaintiff's attorney does not constitute purposeful availment).

Ultimately, the only arguable contact between ASPRS, Dr. Goldwyn, and Utah that relates to this action was the eventual use by Dr. Woolf of a consent form in Utah. In effect, the Utah Supreme Court has held that ASPRS and Dr. Goldwyn's assistance in preparing this consent form which was subsequently used by a third-party in Utah is a sufficient contact with Utah to establish that ASPRS and Dr. Goldwyn have purposefully availed themselves of the privilege of conducting activities in Utah.

The Utah Supreme Court appears to be applying the "stream of commerce" theory of jurisdiction which courts developed in recognition of the ever-increasing nationwide nature of commercial activity. Using the stream of commerce theory, some courts have held that a defendant who merely places a product into the stream of interstate commerce is subject to jurisdiction in any State into which the product subsequently flows. *See Asahi Metal*, 480 U.S. at 110-11 (discussing conflicting views of the stream of commerce theory).

While this Court has addressed the stream of commerce theory on several occasions, it has yet to definitively decide whether merely placing a product into the stream of interstate commerce is sufficient to justify an assertion of jurisdiction in any State where the product is found. In *World-Wide Volkswagen*, this Court rejected plaintiff's argument that mere foreseeability that a product might find its way into a State can independently constitute purposeful availment such as to satisfy the requirements of due process. 444 U.S. at 295-96. Specifically, this Court held that it would be unreasonable to exercise personal jurisdiction where the defendant had not made any efforts directly or indirectly to market its products in the forum State.

This Court's most recent pronouncement on the stream of commerce theory came in *Asahi Metal*. Justice O'Connor, writing for a plurality of the Court, expressly rejected the stream of commerce theory.

> The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product into the stream of commerce without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State

> does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.

480 U.S. at 112 (plurality opinion) (citations omitted). In his concurring opinion in which three other justices joined, Justice Brennan disagreed with the plurality's rejection of the stream of commerce theory. 480 U.S. at 116. Thus, there was no clear holding by a majority of this Court on the viability of the stream of commerce theory as a sufficient basis for a State's exercise of jurisdiction over a non-resident defendant.

Since *World-Wide Volkswagen* and *Asahi Metal*, lower courts have continued to struggle with the proper role of the stream of commerce theory in the jurisdictional inquiry. Several courts, while recognizing the confusion regarding the applicability of the stream of commerce theory, have rejected the theory or seriously questioned its merit. *See Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 659 (4th Cir. 1989) (plaintiff may not rely on unadorned stream of commerce theory); *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 271, 736 P.2d 2, 7 (Ariz. 1987) (noting differing views on viability of stream of commerce theory); *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal. App. 3d 106, 117, 240 Cal. Rptr. 670, 675 (1987) (rejecting stream of commerce theory); *cf. Chung v. NANA Dev. Corp.*, 783 F.2d 1124, 1129 (4th Cir.), *cert. denied*, 479 U.S. 948 (1986) (mere foreseeability that product may reach distant forum not sufficient).

This is an even less appropriate case for application of the stream of commerce test than were *World-Wide Volkswagen* and *Asahi Metal*. In those cases, the defendant was engaged in commercial activity—it obtained revenue and anticipated receiving a profit as a result of placing the

product into the stream of commerce. In this case, there is no commercial motive behind the assistance which ASPRS and Dr. Goldwyn provided Dow in the preparation and conduct of the Study. *Cf. State ex. rel. Wichita Falls Gen. Hosp. v. Adolf*, 728 S.W.2d 604, 609 (Mo. App.), *cert. denied*, 484 U.S. 927 (1987) (noting that providing organs suitable for transplant was not commercial activity of the type commonly found to support jurisdiction). There is no evidence that ASPRS or Dr. Goldwyn ever anticipated achieving any commercial or economic benefit as a result of its assistance with Dow in drafting the consent form.

Thus, this case is unlike all prior cases in which courts, including this Court, have found that a defendant's conduct with respect to the forum State constitutes purposeful availment in the sense of the defendant transacting business in the forum State. As this Court has recognized on numerous occasions, the rationale justifying the substantial expansion of the due process test is the modern reality of conducting business in the United States and the world. *See, e.g., McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (expansion of scope of jurisdiction is the result of transformation of national economy). Neither ASPRS nor Dr. Goldwyn were conducting business through their involvement in the Study. Rather, each was participating on a voluntary basis in a Study which promised "societal", as opposed to "personal" benefits.

B. A Proper Consideration of the Reasonableness Factors Establishes that Utah's Assertion of Personal Jurisdiction Over ASPRS and Dr. Goldwyn Violates Due Process

In *World-Wide Volkswagen*, this Court set forth several factors independent of a defendant's purposeful conduct

that are relevant to the consideration of the reasonableness of a State's assertion of personal jurisdiction.

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

World-Wide Volkswagen, 444 U.S. at 292 (citations omitted); *see also Burger King*, 471 U.S. at 477. Indeed, this Court has held that these reasonableness factors can defeat jurisdiction, notwithstanding the fact that the defendant may have purposefully availed itself of the privilege of conducting activities within the forum State. *See Asahi Metal*, 480 U.S. at 113-15 (eight Justices agree that assertion of jurisdiction over defendant would be unreasonable even assuming purposeful availment).

The Utah Supreme Court failed to meaningfully consider the reasonableness of exercising personal jurisdiction over ASPRS and Dr. Goldwyn.[15] In so doing, it violated ASPRS' and Dr. Goldwyn's due process rights by subjecting them to an exercise of Utah jurisdiction which is not reasonable.

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[15] The Utah Supreme Court noted that "Utah's interest in protecting Anderson from injury is compelling," and further alluded in summary fashion to a "[b]alancing of all the competing interests." Appendix p. 8a. The Utah Supreme Court's opinion, however, does not disclose the nature of the balancing allegedly undertaken.

ASPRS, a not-for-profit association of medical professionals, voluntarily agreed to assist Dow in developing a Silicone Injection Study designed to develop a treatment for two severe, essentially untreatable facial disorders. ASPRS had no profit motive with regard to its assistance in the Study. Moreover, the limited nature of ASPRS' assistance of Dow did not involve the delivery of goods or services in Utah. To the contrary, ASPRS' involvement was limited to an advisory role in which it provided medical and technical expertise and recommendations *to assist Dow*, which prepared the protocol, selected a suitable medical monitor, selected suitable clinical investigators, selected suitable geographic locations for the Study, and prepared a consent form. In agreeing to perform this limited function, ASPRS hoped to assist in the development of a treatment for those persons afflicted with the most critical cases of progressive facial hemiatrophy and lipodystrophy. Similarly, Dr. Goldwyn voluntarily agreed to act as medical monitor for the Study. In so doing, Dr. Goldwyn was not motivated by pecuniary gain; indeed, he was not paid for his services. Rather, Dr. Goldwyn was motivated by a recognition of the societal benefits which could result from the Study.

Requiring ASPRS and Dr. Goldwyn to defend this action in Utah would infringe upon the societal interest which all States share in furthering the advancement of medicine and the development of new treatment techniques. The Utah trial court recognized this when it held, separate from its determination that neither ASPRS nor Dr. Goldwyn had purposely availed themselves of the benefits of the Utah forum, that an assertion of jurisdiction would be unreasonable for social policy reasons.

> The study and practice of medicine is such in our society that there is great interchange that goes on between doctors and organizations of doctors, and it

> is all to the betterment of society that these kinds of things occur. But if by participating as they might in non-profit organizations of non-profit enterprises, if they are going to start subjecting one another to [the] jurisdictions of every single state, we will see a chilling effect take place that will be damaging to society at large.

Appendix p. 15a. The trial court's recognition of the societal need for this type of medical research mirrors the recognition of the United States Senate in its discussion of the provisions of the "Medical Device Amendments of 1976" to the Federal Food, Drug and Cosmetic Act.[16]

> As medicine progresses, as research makes new breakthroughs, an increasing number of sophisticated, critically important medical devices are being developed and used in the United States. These devices hold the promise of improving the health and longevity of American people. The [Health Subcommittee] wants to encourage their research and development. The [Health Subcommittee] also wants to be sure that the FDA has the proper authority to regulate that process so that Americans are not put at risk from the use of unsafe and ineffective medical devices.

S. Rep. No. 94-33, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 1070, 1071. The Senate further noted, "S. 2368 recognizes the benefits that medical research and experimentation to develop devices offers to mankind." *Id.* at 6, 1976 U.S. Code Cong. & Admin. News at 1075.

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[16] The Medical Device Amendments of 1976 gave the Food and Drug Administration enhanced authority to regulate the testing and distribution of medical devices in the market place. *See* S. Rep. No. 94-33, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Admin. News 1070, 1070.

The advancement of medical treatment techniques must necessarily occur through the voluntary participation of professional medical societies, their member physicians, and the manufacturers of medical drugs and devices in the ongoing exchange of medical ideas and treatment techniques. The personal and institutional costs of being subject to jurisdiction in every State in which the fruits of this voluntary participation are tested will have a substantial chilling effect on the extent to which limited participants such as ASPRS and Dr. Goldwyn will be willing to voluntarily contribute to medical studies such as that at issue in this case. *Cf. Grange Ins. Ass'n v. State*, 110 Wash. 2d 752, 763, 757 P.2d 933, 939 (Wash. 1988), *cert. denied*, 490 U.S. 1004 (1989) (court recognized "public policy of ensuring that medical services are fully available to all people, a policy that might be inhibited if doctors were worried about having to defend malpractice suits in distant states"). From society's perspective, this is clearly not a desirable result. Therefore, the interest that all States share in furthering the advancement of medicine renders Utah's assertion of jurisdiction over ASPRS and Dr. Goldwyn unreasonable.

A consideration of the remaining reasonableness factors similarly counsels against an assertion of jurisdiction by Utah. Neither ASPRS nor Dr. Goldwyn disputes the fact that Utah has an interest in adjudicating Anderson's claim. In this case, however, another important state interest weighs against an assertion of Utah jurisdiction. As recognized in *State ex rel. Wichita Falls Gen. Hospital v. Adolf*, 728 S.W.2d 604, 609-610 (Mo. Ct. App.), *cert. denied*, 484 U.S. 927 (1987), all States have a vital interest in protecting and improving the life and health of their citizens. This interest is furthered by each State exercising its jurisdictional authority in a manner that does not discourage the free exchange and development of medical

data and information. The Missouri court in *Adolf* rejected plaintiff's claim that a Texas hospital should be subject to jurisdiction in Missouri based on its efforts in making known to a Missouri patient the availability of a heart suitable for transplantation. The court stated:

> Hospitals making organs available [for transplant] do so for moral and humanitarian reasons. We know of no legal requirement [sic] they do so and we know of no reason why they could not simply refuse to make transplantable organs available or limit the forums to which they will make them available. . . . If the threat of having to defend a potential malpractice action, meritorious or otherwise, in a far distant jurisdiction serves to cause even one hospital to refuse to provide an organ necessary to keep a Missouri resident alive the results far outweigh the inconvenience of requiring Missouri residents to sue in the hospital's home forum.

728 S.W.2d at 610.

This societal concern applies with equal force here. An assertion of jurisdiction by Utah in this case will set a precedent permitting each and every State in which this Study, or any other clinical study of a new drug or device, was conducted to exercise jurisdiction over limited participants such as ASPRS and Dr. Goldwyn. This may result in medical professionals deciding to limit their participation in clinical studies conducted for the benefit of *all* persons inflicted with a particular medical condition. Utah, like all other states, has an interest in avoiding this result.[17]

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[17] Anderson has argued that Utah is the most convenient forum for her in which to conduct this litigation. As has been noted by both courts and commentators, however, "plaintiff's convenience alone cannot justify the heavy burden on defendants which the assertion of jurisdiction would impose." *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 661 (4th Cir. 1989); *see also Moore's Federal Practice*, ¶ 4.41-1[4.-1] (2d ed. 1988).

Thus, had the Utah Supreme Court properly considered the reasonableness of asserting jurisdiction over ASPRS and Dr. Goldwyn in this case, it would have affirmed the trial court's determination that to do so would violate the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted to review and reverse the decision of the Supreme Court of Utah.

Respectfully submitted,

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APPENDICES

APPENDIX A

This opinion is subject to revision before publication in the Pacific Reporter.

IN THE SUPREME COURT OF
THE STATE OF UTAH

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Celia Anderson,
Plaintiff and Appellant,

v.

American Society of Plastic and Reconstructive Surgeons, Dr. Robert Goldwyn, Broadbent & Woolf, Inc., a Utah corporation, Robert M. Woolf, individually, and Dow Corning Corporation,
Defendants and Appellees.

No. 870421

FILED
November 15, 1990

Geoffrey J. Butler,
Clerk

Third District, Salt Lake County
The Honorable Leonard Russon

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Ray R. Christensen, Salt Lake City, for Dow Corning Corporation
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DURHAM, Justice:

Plaintiff Celia Anderson ("Anderson") appeals the dismissal of her complaint against defendants American Society of Plastic and Reconstructive Surgeons, Inc. ("ASPRS"), and Dr. Robert Goldwyn ("Goldwyn") (collectively "defendants") for lack of personal jurisdiction. The other defendants have not contested jurisdiction. This appeal follows trial court certification of its interlocutory order under rule 54(b) of our rules of civil procedure. We vacate the trial court's order of dismissal as to both ASPRS and Goldwyn and remand for trial on the merits, with an order to postpone any ruling on personal jurisdiction until after plaintiff has presented her case.

Anderson's claims arise out of experimental therapy she received for a disfiguring condition of her face. The therapy consisted of injections of an experimental liquid silicone product into her face. The liquid silicone was produced by Dow Corning Corp. ("Dow") and injected by Dr. Robert Woolf ("Woolf") (both defendants, but not parties to this appeal). Anderson reacted severely to the silicone, became grossly disfigured, and suffered a great deal of pain. She filed suit against Dow, Woolf, and Woolf's professional corporation for damages, alleging various causes of action.

During discovery, Anderson found out that ASPRS was involved with Dow in setting up and running the experimental silicone injection program. She also learned that Goldwyn was the medical monitor in charge of ensuring that each patient admitted to the program fell within the FDA guidelines, was an appropriate subject for the experimental therapy, and received appropriate follow-up care in the event of complications. She found that he also supervised much of the medical record keeping for the program and performed various other functions.

Anderson amended her complaint to include ASPRS and Goldwyn, claiming that she should not have received the experimental therapy because she did not fit the program's patient profile, that ASPRS—with Dow—violated federal drug law, that she did not give informed consent for the therapy because of defendants' and Dow's preparation of a defective informed consent form, and that Goldwyn was negligent in performing his monitoring duties.

Defendants moved to dismiss Anderson's complaint against them for lack of personal jurisdiction pursuant to rule 12(b)(2) of our rules of civil procedure. They argued that their conduct did not fall within the activities listed in Utah's long-arm statute and that they had insufficient contacts with this forum for it to assert jurisdiction compatible with due process requirements.

The trial court ruled on defendants' motion based on the pleadings and documentary evidence, including depositions and affidavits. It concluded that to assert jurisdiction over defendants would offend due process. It did not make any findings of fact, but in light of conflicts in the documentary evidence before it, we conclude that the court necessarily weighed the facts in order to reach its conclusions.

Anderson's allegation that the district court can assert specific personal jurisdiction over ASPRS and Goldwyn under our long-arm statute, Utah Code Ann. § 78-27-24 (1987), requires a two-part inquiry. *See, e.g., Bradford v. Nagle*, 763 P.2d 791, 793 (Utah 1988). First, do her claims arise from one of the activities listed in the statute? And second, are defendant's contacts with this forum sufficient to satisfy the due process clause of the fourteenth amendment if the trial court exercises jurisdiction? An additional preliminary question is, what burden must a plaintiff bear

to show that the trial court has personal jurisdiction over a defendant? We will address the preliminary question first.

In *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307 (Utah 1980), we held that in a pretrial determination of jurisdiction, a plaintiff cannot rely on allegations made in the complaint if the defendant has specifically controverted alleged jurisdictional facts by affidavit. *Id.* at 1310. However, we did not answer the question of how to resolve factual disputes—such as conflicts between one witness's deposition and another's affidavit—nor did we decide how to proceed when jurisdiction turns on the same facts as the merits of the case. Both of these problems occur in Anderson's case.

We have not had occasion to address these issues before, but the federal courts have done so. Because our rule 12 is patterned after the corresponding federal rule and because the federal courts routinely apply state long-arm statutes to determine the limits of their own jurisdiction, the federal courts' reasoning is helpful. The following is our synthesis of tenth circuit reasoning on these issues as set forth by five representative cases. *See Ten Mile Indus. Park v. Western Plains Serv. Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987); *Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731, 733 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010 (1985); *Milligan v. Anderson*, 522 F.2d 1202, 1207 (10th Cir. 1975); *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Nova Mud Corp. v. Fletcher*, 648 F. Supp. 1123, 1124-25 (D. Utah 1986).

The approach taken by the federal courts is motivated by concern for flexibility, judicial economy, and preservation of substantial rights. In the federal trial court's discretion, under rule 12 it may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary

hearing. If it proceeds on documentary evidence alone (i.e., the first two methods), the plaintiff is only required to make a prima facie showing of personal jurisdiction. The plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the plaintiff's favor. The trial court must not weigh the evidence unless a hearing is held.

Unless an evidentiary hearing is held, the plaintiff must prove jurisdiction at trial by a preponderance of the evidence after making a prima facie showing before trial. When jurisdiction turns on the same facts as the merits of the case, an evidentiary hearing is inappropriate because it infringes on the right to a jury trial and is an inefficient use of judicial resources (hearing the same evidence twice); in such cases—if the plaintiff has made a prima facie showing—jurisdiction is determined by trial on the merits. Pretrial jurisdictional decisions based on documentary evidence are reviewed de novo by the federal appellate courts.

We approve these guidelines as suitable for our trial courts. Applying them to Anderson's case, we hold that she need only have made a prima facie showing that the trial court had personal jurisdiction over defendants in order to proceed to trial on the merits. Because the facts on which personal jurisdiction over defendants is asserted overlap the facts that will determine whether defendants are liable to Anderson, it was proper for the trial court to rule on personal jurisdiction based only on documentary evidence.

The next issue is whether defendants' actions with respect to Anderson fall within the activities enumerated in our long-arm statute. The trial court did not rule on

this issue; it based its ruling on due process considerations only. Defendants argue that they did not "caus[e] any injury within this state" as required by the statute in tort and breach of warranty cases. Utah Code Ann. § 78-27-24(3) (1987). Although we often assume the application of the statute—and go straight to the due process issue—because our legislature has directed us to construe it "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution," Utah Code Ann. § 78-27-22 (1987); *see Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 661 (Utah 1989), we do not do so here. Whether defendants caused injury to Anderson is the central question on the merits of her claims. She is entitled to have a jury answer that question if she produces sufficient evidence. *See* Utah Code Ann. §§ 78-21-1, -2 (1987).

Anderson has made a prima facie showing that defendants caused her injuries. She has alleged that she should not have been accepted into the program, and deposition testimony shows that she did not fit the program's patient profile. Other documentary evidence shows that it was Goldwyn's responsibility to make sure that all patients admitted to the program fit the profile. This evidence supports a prima facie case of negligence against Goldwyn and an inference that ASPRS may have been negligent in its supervision of Goldwyn or in preparing guidelines for him. There is documentary evidence that ASPRS participated in the program with Dow as a cosponsor and that both may have violated duties imposed by federal drug law. There is further evidence that ASPRS participated with Dow and Goldwyn in preparing the consent form used by physicians participating in the program. Anderson has alleged that she would not have been injured because

she would not have accepted the therapy if the consent form had disclosed the true nature of the risks. The sum of this and other evidence is that Anderson has made a prima facie showing that defendants caused injuries to her in this state.

The last issue is whether defendants have sufficient minimum contacts with this forum to make exercising jurisdiction over them comport with the demands of due process imposed by the fourteenth amendment (neither party briefed state constitutional due process issues). The trial court based its decision on due process, and defendants make their main argument based on due process. Defendants argue, and the trial court ruled, that they lack sufficient contacts with Utah and this litigation to be subject to personal jurisdiction here.

We last reviewed due process requirements for personal jurisdiction in *Parry v. Ernst Home Center.*[1] Our analysis is the same here. Defendants' contacts with Utah must be "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Defendants must have "reasonably anticipate[d] being haled into court" here, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and they must have "purposefully avail[ed]" themselves of the privilege of conducting activities here. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The trial court must also balance "the convenience of the parties" and weigh this forum's interest

[1] Although not relevant to this case, we acknowledge the issues raised about this case by the commentary in Note, *Parry v. Ernst Home Center Corporation: The "Mauling" of Personal Jurisdiction Theory*, 1190 Utah L. Rev. 479 (authored by Marc Young).

in asserting jurisdiction. *Mallory Eng'g, Inc. v. Ted R. Brown & Assoc.*, 618 P.2d 1004, 1008 (Utah 1980); *see also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

After reviewing the record in light of the standards articulated above, we hold that Anderson has made a prima facie showing that defendants had sufficient contacts with Utah and this litigation for assertion of personal jurisdiction consistent with due process. Facts supporting this conclusion include the following: ASPRS—(1) its committee selected Salt Lake City as a program site, (2) its committee selected Woolf as a program physician, (3) it assisted in preparing the consent form which it knew would be used in Utah, (4) it (with Dow) selected Goldwyn as monitor of treatment in the program, including anticipated treatment in Utah, (5) it investigated the potential for malpractice claims, including those that might arise in Utah, and (6) it trained Woolf, knowing he would use that training in Utah; Goldwyn—(1) helped draft the consent form, (2) supervised the proper administration of the treatment program in Utah, (3) authorized Anderson's silicone injections, and (4) assumed responsibility to monitor Anderson's treatment and to follow up if there were problems.

The foregoing facts show purposeful acts with known, significant consequences in Utah. Utah's interest in protecting Anderson from injury is compelling. Balancing all of the competing interests, we hold that it is fair to require defendants to subject themselves to trial in a Utah court for the purpose of determining whether Anderson can prove jurisdiction, and hence liability (namely, that defendants caused her injury and damages).

We vacate dismissal and remand to the trial court for trial on the merits. Because the facts supporting jurisdic-

tion overlap the facts supporting liability, the trial court must allow defendants to renew their motion to dismiss for lack of jurisdiction at the close of Anderson's evidence.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

I. Daniel Stewart, Justice

Michael D. Zimmerman, Justice

APPENDIX B

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IN THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

CELIA ANDERSON,

Plaintiff,

vs.

BROADBENT & WOOLF, INC., a Utah corporation, ROBERT M. WOOLF, individually, DOW CORNING CORPORATION, ROBERT GOLDWYN, an individual, and THE AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS,

Defendants.

ORDER OF
DISMISSAL

Case No. C-83-7367

Judge
Leonard H. Russon

Defendants American Society of Plastic and Reconstructive Surgeons ("ASPRS") and Dr. Robert M. Goldwyn's Motions to Quash Service of Process and for Dismissal of Plaintiff's Complaint in the above-captioned matter came on regularly for hearing before the above-entitled court on September 25, 1987 in a special setting at the hour of 9:00 a.m.; Elliott J. Williams and Larry R. Laycock of Snow, Christensen & Martineau appeared on behalf of defendants ASPRS and Robert M. Goldwyn, M.D. and Dan Bertch appeared on behalf of plaintiff Celia Anderson, and the court having heard oral argument, reviewed the pleadings and memoranda filed herein, and being fully apprised in the premises hereby finds:

1. Defendant Robert M. Goldwyn, M.D., did not have contacts with the State of Utah or plaintiff sufficient to satisfy the minimum contacts requirement for assertion of *in personam* jurisdiction pursuant to the Utah Long-Arm Statute (*Utah Code Ann.* § 78-27-24 (Supp. 1987)).

2. To assert *in personam* jurisdiction over Dr. Goldwyn under the circumstances of this case would constitute a violation of constitutional due process.

3. Dr. Goldwyn's motion for dismissal and to quash service of process should be granted on all of the grounds listed in the memoranda submitted by Dr. Goldwyn.

4. Defendant ASPRS did not have contacts with the State of Utah or plaintiff sufficient to satisfy the minimum contacts requirement for assertion of *in personam* jurisdiction pursuant to the Utah Long-Arm Statute (*Utah Code Ann.* § 78-27-24 (Supp. 1987)).

5. To assert *in personam* jurisdiction over ASPRS under the circumstances of this case would constitute a violation of constitutional due process.

6. ASPRS' motion for dismissal and to quash service of process should be granted on all of the grounds cited in the memoranda submitted by ASPRS.

7. The court finds that there is no just reason for delay and entry of judgment should be expressly directed as provided in Rule 54(b), Utah Rules of Civil Procedure.

NOW, THEREFORE, BASED UPON THE FOREGOING AND GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED:

1. Defendants ASPRS and Dr. Robert M. Goldwyn's motions for dismissal and to quash service of process be and the same are hereby granted and the plaintiff's claims against said defendants are dismissed and service of process upon them is quashed for the reason the courts of the State of Utah lack personal jurisdiction over them.

2. There is no just reason for delay and entry of this Order as a final judgment is hereby expressly directed pursuant to Rule 54(b), Utah Rules of Civil Procedure.

DATED this ____ day of October, 1987.

BY THE COURT:

Leonard H. Russon
District Court Judge

APPENDIX C

IN THE
DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT IN AND FOR
LAKE COUNTY, STATE OF UTAH

* * * * *

CELIA ANDERSON	)	
	)	
Plaintiff,	)	Transcript of:
	)	
vs.	)	JUDGE'S RULING
	)	
BROADBENT and WOOLF	)	
	)	
Defendants.	)	Case C83-7367

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Leonard H. Russon, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Friday, September 25, 1987.

APPEARANCES

For the Plaintiff:	DANIEL F. BERTCH Attorney at Law 6558 South Stanwich Rd. Sale Lake City, Utah
For the Defendants:	LARRY LAYCOCK ELLIOTT WILLIAMS Attorneys at Law 10 Exchange Place Salt Lake City, Utah

FRIDAY, SEPTEMBER 25, 1987

PROCEEDINGS

THE COURT: In reviewing the affidavits in this case, it would appear to this Court that Dr. Robert Goldwyn has no contact at all with the State of Utah. He has never basically been here, or owns property here, or practices here, or has any real contact this state. Nor has he ever had any personal contact with the plaintiff, nor she with him, and it would appear that she didn't really know that he existed, or his identity. And that the only possible connection between Dr. Goldwyn and Utah would be his participating in the preparation of a Consent Form and his reviewing papers sent to him in regards to Celia Anderson that would indicate she is approved for the program.

And, in view of the facts, that indicates to this Court that that does not constitute the sufficient minimal contacts required, nor the conducting of business, or the cause of committing a tort within the—or damage within the State of Utah, to bring him within the long-arm statute.

And that if, in fact, this Court were to attempt to exercise jurisdiction over him, I believe that he would be violating his due process in that he simply does not have those minimal contacts with the state, nor has availed himself of the business, to conduct the business within this state. And therefore, in regard to Dr. Goldwyn, the Motion to Quash, as well to Dismiss, is granted.

I will specifically say, so we don't have to repeat ourselves completely, it is granted for the reasons that have been set forth in the Memorandum of Points and Authorities that have been filed in support of Dr. Goldwyn.

As for the ASPRS, I think the home ruling is in order. I think likewise the fact that they are part of a study and have some sort of a relationship with Dow Chemical,

and the fact that they have some members of their organization in the state, simply are insufficient contacts to meet the minimum contact requirement. The said organization, I believe, has not purposefully availed itself of the privileges of conducting business in the State of Utah. Does not conduct business. It is a non-profit organization. It has apparently a great deal of interest in this program, but its activities are not such to constitute the minimal contacts required, and that to attempt to exercise jurisdiction over that organization would be a violation of its due process rights.

I further think that in addition— And I am going to grant the Motion to Dismiss and Quash in regards to American Society of Plastic and Reconstructive Surgeons for the reasons set forth in the Memorandum filed in support of that organization.

In addition to all of that, I do think that there is a very serious social policy program involved with all of this. The study and practice of medicine is such in our society that there is great interchange that goes on between doctors and organizations of doctors, and it is all to the betterment of society that these kinds of things occur. But if by participating as they might in non-profit organizations of non-profit enterprises, if they are going to start subjecting one another to jurisdictions of every single state, we will see a chilling effect take place that will be damaging to society at large.

I think the State Legislature clearly has recognized this by statute wherein the State of Utah there is a statutory privilege that goes to inner-medical investigations and hospitals, and otherwise, because as a public policy, we want doctors and hospitals to feel free to openly investigate procedures and practices in hospitals, and to speak freely in the meetings, without allowing such freely expressed thoughts to suddenly be staring them in courts of law.

And therefore, we have statutes that protect in that regard.

I think that sets a public policy purpose that would certainly go on to extend to other types of activities similar to the activities that we have here.

The case of Celia Anderson, if she has a case, is against Dr. Woolf, against Dow Corning. The replies— The Consent Form involved, it doesn't matter who prepared it. The fact is, there are parties to that and that would be between Dr. Woolf and Mrs. Anderson, the form itself, and possibly Dow Corning. I can't speak to that at this point. And whether or not Dr. Woolf performed as he should have, or whether or not he selected her as he should have, or whether or not the product was as it should have, are among the many issues that are reserved and will be conducted at the time of trial.

The motions, therefore, of Robert Goldwyn and the American Society of Plastic and Reconstructive Surgeons are granted and the attorneys who appear for them at this hearing may prepare the appropriate Order in that regard.

MR. WILLIAMS: Your Honor, the case has been pending for four years. It may be interminable. I would hate to have Dr. Goldwyn and the Society have to wait years before this Order becomes final. I would therefore ask the Court for a finding that there is no just cause for delay and this Order ought to be final upon signature and entry.

MR. BERTCH: I concur.

THE COURT: I will certify the Order as a final Order as to Robert Goldwyn and the American Society of Plastic and Reconstructive Surgeons.

MR. WILLIAMS: Thank you, Your Honor.

(Hearing adjourned.)

* * * *

APPENDIX D

SUPREME COURT OF UTAH
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

February 6, 1991

OFFICE OF THE CLERK

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Celia Anderson,
Plaintiff and Appellant,
v. No. 870421

Broadbent & Woolf, Inc., a Utah corporation, Robert M. Woolf, individually, Dow Corning Corporation, American Society of Plastic and Reconstructive Surgeons, and Dr. Robert Goldwin,
Defendants and Appellees.

THIS DAY, Petition for Rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is, denied.

Geoffrey J. Butler
Clerk